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NOTE

MORATORIUM ON SCHOOL BUSING FOR THE PURPOSE OF ACHIEVING RACIAL BALANCE: A NEW CHAPTER IN CONGRESSIONAL COURT-CURBING

I. Introduction

On June 23, 1972, the Education Amendments of 1972¹ were signed into law. The Amendments constitute the first piece of federal legislation designed, at least in part,² to curb federal court reliance upon busing of school children to achieve racial balance.³ While the legislation was less stringent than the President desired⁴ and was criticized by many for its impotency,⁵ it sounded the opening shot in the newest battle between the courts and Congress in a war that began with the *Brown*⁶ decision of 1954.

This note will examine antibusing legislation and consider whether Congress has the power to suspend court-ordered busing of school children while contemplating ways to deal with a problem of national concern. The article will

1 Pub. L. No. 92-318 (June 23, 1972).

2 While the Education Amendments of 1972 are primarily concerned with financial assistance for higher education, §§ 801-06 relate specifically to transportation of students as a means of overcoming racial imbalance.

3 The central provision relating to court-ordered busing is § 803 which states:

Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be *postponed* until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. (Emphasis added.)

4 Prior to the enactment of the Education Amendments of 1972, the President requested congressional passage of two measures. His proposed Student Transportation Moratorium Act, S. 3388, 92d Cong., 2d Sess. (1972) would *bar* all new court-ordered busing in the short run, while the Equal Educational Opportunities Act, S. 3395, 92d Cong., 2d Sess. (1972) would permanently prohibit student transportation except where it was the *only* remedy by which dual school systems might be desegregated. Special Message from President Nixon submitted to Congress on Busing and Equality of Educational Opportunity, H.R. Doc. No. 195, 92d Cong., 2d Sess. (1972).

5 Several congressmen have expressed dissatisfaction with the legislation and have promised their support to future enactments which place stronger restraints upon court-ordered busing. *See, e.g.*, 118 CONG. REC. 8376 (daily ed. May 24, 1972) (remarks of Senator Byrd); *id.* at 8385 (remarks of Senator Stennis); *id.* at 8377 (remarks of Senator Allen). The criticism centers around three areas: 1) the act does not prevent federal courts from ordering busing for desegregation purposes but merely postpones implementation of such orders; 2) under § 802 (a) local school districts are still allowed to request federal financial assistance for busing purposes; consequently, federal district courts could order the transportation of students and force such districts to request the funds or be held in contempt; 3) the act discriminates against the many school districts which have already implemented desegregation plans involving the busing of students.

6 347 U.S. 483 (1954). In the now-familiar *Brown* decision the Court declared that so-called "separate but equal" educational facilities deprive minority students of the educational opportunities afforded to majority children thereby denying minority students so situated the equal protection of the laws guaranteed by the fourteenth amendment. One year later the Court implemented its 1954 decision by requiring the dissipation of dual educational systems "with all deliberate speed," *Brown v. Board of Education*, 349 U.S. 294, 301 (1955), and by compelling the lower federal courts "to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." *Id.* at 299.

also analyze related issues as to separation of powers, congressional authority under article III of the Constitution and section five of the fourteenth amendment, judicial review, and the history of congressional-judicial confrontations—all in an attempt to determine whether such student transportation enactments can withstand the test of constitutionality.

II. Grounds for Congressional Attacks Upon the Judiciary

Congress has several grounds upon which to premise an attack upon the judiciary and has either employed or seriously considered all of them over the one hundred eighty-three year history of the Constitution.⁷ The architects of the Constitution emphatically urged a system of checks and balances whereby each of the federal branches might command certain controls over the others in order to keep each within the functional boundaries prescribed for it.⁸ The proddings of the framers came to fruition in the Constitution itself,⁹ and the document is thus fitted with provisions that allow the national legislature to curb the federal courts to at least a limited extent.

A. Article III

The major flaw in the armor of the judiciary is article III of the Constitution, the source of most congressional attacks upon the courts. This article vests the national judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (Emphasis added.)¹⁰ From the earliest interpretations of this section in the decisions of the Supreme Court, it has been a commonly accepted maxim that the jurisdiction of all inferior federal tribunals depends entirely upon the authority of Congress. Relevant cases have consistently relegated the lower federal courts to plenary congressional control and have continually proclaimed the national legislature's

7 For a history of congressional attacks upon the Supreme Court, see generally W. MURPHY, CONGRESS AND THE COURT (1962); C. PRITCHETT, CONGRESS VERSUS THE SUPREME COURT 3-31 (1961); R. HIRSCHFELD, THE CONSTITUTION AND THE COURT 22-60 (1962); Elliott, *Court-Curbing Proposals in Congress*, 33 NOTRE DAME LAWYER 597 (1958).

8 James Madison bespoke the mood of the Constitutional Convention as regards checks and balances when he stated:

[U]nless [the legislative, executive, and judiciary] departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim [of separation of powers] requires, as essential to a free government, can never in practice be duly maintained.

It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. THE FEDERALIST No. 48, at 308 (Mentor ed. 1961) (J. Madison).

9 For example, under the Constitution, the Supreme Court is able to check both the President and Congress by reviewing the constitutionality of their actions. The legislative and executive branches may also check the judiciary's power. The President may do so by means of his law enforcement powers and Congress by way of limiting the Court's appellate jurisdiction.

10 U.S. CONST. art. III, § 1.

right to create and abolish them.¹¹ The 1845 case of *Cary v. Curtis*¹² typifies the Court's approach:

[T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good . . . [T]he organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature.¹³

Almost one hundred years later the Court cited *Cary v. Curtis* when it stated:

All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to "ordain and establish" inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts . . .¹⁴

Since 1796, the Supreme Court has suggested that according to article III, section 2 of the Constitution its own jurisdiction is likewise subject to unlimited congressional control. This section is commonly referred to as the "exceptions and regulations" clause and in addition to delineating the scope of judicial power it proclaims that:

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases . . . the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions and under such Regulations as the Congress shall make.* (Emphasis added.)¹⁵

Congressional court-curbing capabilities, as derived from the "exceptions and regulations" clause, have been augmented by the Supreme Court itself¹⁶ since the Court has placed a strict interpretation upon article III.¹⁷ Some analysts claim

11 *Cary v. Curtis*, 44 U.S. (3 How.) 265, 276-77 (1845); *Sheldon v. Sill*, 49 U.S. (8 How.) 453, 461-62 (1850); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 330 (1937); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).

12 44 U.S. (3 How.) 265 (1845).

13 *Id.* at 276-77.

14 *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).

15 U.S. CONST. art. III, § 2.

16 See *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 253, 259 (1796); *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 7, 9 n.a (1799); *United States v. More*, 7 U.S. (3 Cranch) 96, 104 (1805); *Durousseau v. United States*, 10 U.S. (6 Cranch) 177, 180 (1810); *McNulty v. Batty*, 51 U.S. (10 How.) 77, 84 (1850); *Daniels v. Railroad Company*, 70 U.S. (3 Wall.) 250 (1869); *Gordon v. United States*, 117 U.S. 697, 699-701, 705 (1885).

17 Several articles have dealt with the congressional power to limit the appellate jurisdiction of the federal courts and the Supreme Court in particular. Among the most noteworthy are Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109

that the Court's own interpretation provides a basis for denying all appellate jurisdiction,¹⁸ but most see limits beyond which Congress cannot go.¹⁹ The ultimate perimeters of Congress' article III power will be discussed later. Of immediate importance, however, is the fact that the Court's own interpretation of the clause tends to support attempts by Congress to limit or deny jurisdiction of the Supreme Court.

The first case to examine the powers of Congress under article III, section 2 was *Wiscart v. D'Auchy*²⁰ where it was concluded that the appellate jurisdiction of the Supreme Court is limited because it is given "with such Exceptions and under such Regulations as Congress shall make."²¹ The Court further stated that it cannot exercise appellate jurisdiction unless Congress has provided a rule to regulate such proceedings. Where a rule is provided, the Court "cannot depart from it."²²

Three years following the *Wiscart* decision, the Court made its position even clearer when in *Turner v. Bank of North America*²³ it noted that:

The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise. . . .²⁴

Subsequent decisions were in accord with the *Turner* view.²⁵

U. PA. L. REV. 157 (1960); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Lenoir, *Congressional Control Over the Appellate Jurisdiction of the Supreme Court*, 5 KANSAS L. REV. 16 (1956); Halper, *Supreme Court Responses to Congressional Threats: Strategy and Tactics*, 19 DRAKE L. REV. 292 (1970).

18 For example, former Supreme Court Justice Roberts concluded that according to the language and judicial interpretation of article III there is nothing to prevent Congress from removing all of the Supreme Court's jurisdiction. Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1 (1949).

19 See, e.g., articles cited *supra* note 17.

20 3 U.S. (3 Dall.) 253 (1796).

21 *Id.* at 257.

22 3 U.S. (3 Dall.) at 258. Justice Marshall referred to *Wiscart v. D'Auchy* in a later case and expressed the view that where Congress makes no regulation with respect to the Supreme Court's appellate jurisdiction the Court has complete jurisdiction by virtue of its constitutional grant. *United States v. More*, 7 U.S. (3 Cranch) 96, 104 (1805); *accord*, *Durousseau v. United States*, 10 U.S. (6 Cranch) 177, 180 (1810). It should be noted, however, that this statement was dictum and that it only applied where there was a complete absence of congressional regulation. Since that situation has never existed the case is barely distinguishable from the original *Wiscart* view and Marshall would certainly revert to the *Wiscart* rationale once Congress acted at all. Lenoir, *supra* note 17.

23 4 U.S. (4 Dall.) 7 (1799).

24 *Id.* at 9, n.a.

25 See *Durousseau v. United States*, 10 U.S. (6 Cranch) 177, 181 (1810):

The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.

See also *United States v. More*, 7 U.S. (3 Cranch) 96, 104 (1805); *Daniels v. Railroad Company*, 70 U.S. (3 Wall.) 250, 254 (1865), where two prerequisites were established by the Court for the exercise of its appellate jurisdiction:

In order to create [appellate] jurisdiction in any case, two things must concur: the Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority.

The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and the legislative department of

In *McNulty v. Batty*²⁶ the Court concluded (from the fact that it could not exercise appellate jurisdiction unless conferred upon it by a congressional act) that if an act conferring jurisdiction expires, the jurisdiction ceases also, even where an appeal is pending in the Court at that time.²⁷ From this, it might be deduced that an act conferring jurisdiction can also be retracted thereby denying the jurisdiction which previously existed.

Such a retraction occurred in 1868 and the nation's highest court responded with its furthest concession to congressional control. *Ex parte McCordle*²⁸ saw a petitioner bring his habeas corpus petition before the Supreme Court, which at the time had authorization to grant such relief under a congressional act passed in 1867. After argument was heard, but prior to the Court's decision, Congress passed the Act of March 27, 1868, repealing the portions of the 1867 act which conferred habeas corpus jurisdiction upon the Court.²⁹ The Court then dismissed the case, proclaiming, in part:

We are not at liberty to inquire into the motives of the legislature. We can only examine into its powers under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.³⁰

In its strictest sense, *Ex parte McCordle* has been viewed as acknowledging the existence of a congressional power to thwart the appellate jurisdiction of the Supreme Court merely by passing legislation which withdraws the Court's authority to review any particular pending case.³¹ This interpretation could have drastic consequences should Congress attempt to forestall court-ordered busing by means of its article III powers.

B. Other Grounds

Aside from constitutional control over the federal judiciary, Congress has several other means for conducting an assault on the courts.³² Impeachments,³³ constitutional amendments,³⁴ and legislative reversals of judicial rulings³⁵ highlight

the government can enlarge neither one nor the other. But it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation. *Id.* at 254.

26 51 U.S. (10 How.) 77 (1850).

27 *Id.* at 84.

28 74 U.S. (7 Wall.) 506 (1869).

29 For a history of events leading up to the *McCordle* decision see W. MURPHY, CONGRESS AND THE COURT 37-8 (1962); Ratner, *supra* note 17, at 180; Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 B.U. L. REV. 1, 21-2 (1951).

30 74 U.S. (7 Wall.) at 514.

31 Ratner, *supra* note 17 at 180.

32 Several treatises and articles have enumerated congressional tools used to attack the Court. See, e.g., C. PRITCHETT *supra* note 7, at 25-6; R. HIRSCHFELD, *supra* note 7, at 22; Halper, *supra* note 17.

33 A case in point is the attempted impeachment of Justice Chase early in the nineteenth century in response to what Jeffersonians considered Federalist abuse of the judicial office. See generally I WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922).

34 Several constitutional amendments have been proposed and, of these, many have been rather broad in their scope. One such proposal, for example, sought to provide a procedure

the restless history of American justice. The methods most frequently suggested and employed are the article III powers already discussed and manipulation of the number and qualifications of justices sitting on the various federal benches.³⁶

III. Congressional Court-Curbing: A Historical View

The current attack on the federal judiciary draws much of its strength from the resources just described. Before proceeding to a more detailed discussion of antibusing proposals, however, it will be helpful to recount some of the more conspicuous congressional-judicial conflicts of the past.

The first major confrontation occurred at the beginning of the nineteenth century and has become familiar history to students of constitutional law. In the elections of 1800 the reins of government were wrested from the powerful Federalists by Thomas Jefferson and his Republican Party. Nevertheless, in the interim between the election and actual passage of political control, the Federalists devised a scheme to perpetuate their influence on the national government. Their plan included the enactment of the Judiciary Act of 1801 which doubled the number of federal judgeships and the appointment of several "lame duck" judges to fill the newly created posts. The legislation infuriated the recently elected Republicans, and they refused to deliver several commissions that remained unrepresented when the Federalists left office. When the Supreme Court granted an order to show cause why mandamus requiring delivery of the commissions should not be issued, however, the Republicans introduced a bill to repeal the Act of 1801. After it passed the Republican legislature took an even more radical step. Realizing that the repealer's constitutionality would be questioned by the Court and desiring to postpone such an inevitability, an additional bill was introduced and passed which abolished the June and December Supreme Court terms (created by the Act of 1801) and restored the old February term but not the August term. This legislative ploy forced adjournment of the Court for fourteen months.³⁷

When the Court reconvened, Chief Justice Marshall announced the famous

whereby Congress could limit the Supreme Court's authority to find federal or state statutes unconstitutional by a two-thirds vote of each house. H.R.J. Res. 476, 85th Cong., 2d Sess. (1958). Another would have reserved to the states exclusive jurisdiction over "interference with or limitation upon the power of any State to regulate health, morals, education, marriage, and good order in the State." H.R.J. Res. 175, 85th Cong., 1st Sess. (1957). The most common proposal would require an extraordinary majority in the Supreme Court in order to declare an act of Congress unconstitutional. See generally W. MURPHY, CONGRESS AND THE COURT 50 (1962).

On several occasions more modest constitutional amendments have been proposed seeking merely to overturn certain decisions rather than to directly attack the Court. The 11th amendment reversed *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 363 (1793). The 13th and 14th amendments in part reversed *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). And the 16th amendment reversed *Pollock v. Farmers' Loan and Trust Co.*, 158 U.S. 601 (1895). Halper, *supra* note 17 at 309.

35 See, e.g., Jencks Act, 18 U.S.C. § 3500 (1970).

36 See note 7, *supra*. Other seldom used tools of judicial control have been proposed. Such things as the election of federal judges, experience requirements, and denial of funds to the courts have all been considered by the Congress. The "case or controversy" formula of article III and the notion of judicial self-restraint have also moderated judicial independence. See R. HIRSCHFELD, *supra* note 7, at 22. W. MURPHY, CONGRESS AND THE COURT 2 (1962).

37 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 206-65 (1922).

*Marbury v. Madison*³⁸ decision which effectively ended the first battle between Congress and the Court.³⁹ To the surprise of the Republicans, he declared unconstitutional the statute under which the mandamus had been issued,⁴⁰ thereby eliminating the main point of confrontation. While the opinion set forth a rule of law outwardly favoring the opponents of the judiciary, it had successfully asserted the Court's power to adjudicate the constitutionality of congressional enactments. The Supreme Court thus emerged from its first confrontation with Congress stronger and more independent than before.

Four more major attacks were launched against the Court prior to the present busing dispute. The most vigorous battles were fought during the Civil War period and the Progressive (1920's), New Deal (1930's), and Warren Court (1950-60's) eras.⁴¹

The Civil War confrontation began with the *Dred Scott*⁴² decision but did not reach its peak until the war had ended and "reconstruction" had begun. Under the post-Civil War Reconstruction Acts, military governments were congressionally imposed on many of the former Confederate States. McCardle, a Mississippi newspaper editor, was placed in military custody for publishing certain pro-southern articles. By invoking the Habeas Corpus Act of 1867, which authorized use of the writ by anyone restrained "in violation of the Constitution" and provided for appeals to the Supreme Court, McCardle's attorney brought his case before the Court. The Court noted jurisdiction of the appeal in January, 1868, with a hearing set for March of that year. Radicals in Congress who desired to continue military rule in the South feared that the Court might use the *McCardle* petition to strike down all "reconstruction" enactments and they passed a bill repealing, in part, the Act of 1867. Despite the fact that arguments had already been heard, the Court postponed its decision of the case until the repealing act took effect⁴³ and twelve months later concluded that its jurisdiction had been removed by the latter act.⁴⁴ The opinion noted that review of habeas corpus petitions could still be had in other federal tribunals as well as the Supreme Court itself if brought there originally,⁴⁵ but Congress had unquestionably won the day.

The 1920's provided the setting for the next major congressional assault.

38 5 U.S. (1 Cranch) 87 (1803).

39 See W. MURPHY, CONGRESS AND THE COURT 8-12 (1962) [hereinafter cited as MURPHY].

40 5 U.S. (1 Cranch) at 111.

41 The interim periods between the major confrontations were not altogether peaceful. For example, three court-controlling measures were suggested in Congress around 1820. One would have given the Senate appellate jurisdiction over the Supreme Court; another would have required an extraordinary majority of the Court to declare a statute unconstitutional; and a third would have modified the Judiciary Act. MURPHY, *supra* note 39, at 21-7. Later, between 1821 and 1882, at least ten bills to deprive the Court of its appellate jurisdiction were introduced. Halper, *supra* note 17, at 307.

42 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) held, in effect, that Negro Americans were not considered citizens. The decision prompted severe criticism by northern senators and by Lincoln himself, and several court-curbing measures were proposed. The most radical was submitted by Senator Hole of New Hampshire who called for an entire new Supreme Court. MURPHY, *supra* note 39, at 31.

43 MURPHY, *supra* note 39, at 37-8. See also note 29 *supra*.

44 *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

45 *Id.* at 515.

"Progressives" led by Senator Robert La Follette of Wisconsin were pushing for more government regulation of business when, in 1922 and 1923, the federal judiciary struck several blows to such regulatory legislation.⁴⁶ Congress responded in what had become a typical manner. The usual variety of "extraordinary majority" amendments appeared as well as those which would allow congressional reversal of judicial decisions by a two-thirds vote in each house of the national legislature.⁴⁷ La Follette himself suggested a program by which inferior federal judges would not be allowed to declare congressional enactments unconstitutional. In addition, where the Supreme Court found an act unconstitutional, Congress would have the option to repass the legislation and thus nullify the decision. Despite the severity of the "Progressive Era" attack, the Court issue died in 1924 when the "Progressives" were defeated at the polls.⁴⁸

Perhaps the most famous attack on the judiciary came during the 1930's when President Roosevelt challenged a Supreme Court which had become an obstruction to his "New Deal" legislation. When his program to lift the nation out of the depression became seriously threatened by a conservative Supreme Court, the President had three alternatives with which to neutralize the antagonistic tribunal: 1) limitation of its reviewing power by a constitutional amendment; 2) statutory restriction of its appellate jurisdiction in certain areas; and 3) an increase in the number of Supreme Court justices by an act of Congress. The first alternative would take too long and Roosevelt feared that the Court would strike down the second on constitutional grounds. He chose the third, therefore, and sent his now-familiar "court-packing" plan to Congress.⁴⁹ There the response was mixed. Many legislators considered the scheme an infringement upon the powers of the Supreme Court and the majority apparently desired both an independent tribunal and the "New Deal." The conflict was resolved when the attitude of the Court itself mellowed. The Court's retreat became complete with the decision of *National Labor Relations Board v. Jones & Laughlin Steel Corp.* where the Court upheld the National Labor Relations Act.⁵⁰ Following that decision the "court-packing" plan was dropped.

The current busing dispute is only the latest development in a battle which began with the *Brown* decision in 1954. Once the Supreme Court truly entered the race relations arena⁵¹ it became the object of tremendous congressional pressure, especially from southern senators. When the Court handed down several

46 *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895); *Swift and Company v. United States*, 196 U.S. 375 (1905).

47 Note 34 *supra*.

48 MURPHY, *supra* note 39, at 50.

49 The plan Roosevelt sent to Congress called for the voluntary retirement of justices at age 70. If a justice failed to retire he could remain in office but the President would then have the power to appoint an additional member. R. HIRSCHFELD, *supra* note 7, at 45.

50 301 U.S. 1 (1937).

51 While *Brown* was the first case to characterize segregated facilities, even where equal, as a violation of the fourteenth amendment, cases prior to the 1954 decision indicated that the Court was prepared to decide questions in the race relations area. See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950) where the Court applied the "separate but equal" rule and held that a Negro law school in Texas was not "equal" to the University of Texas Law School. See also *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

decisions viewed as sympathetic to communists the stage was set for the most severe attack yet.⁵²

The siege began in 1955 when Representative Smith of Virginia, a staunch conservative and segregationist,⁵³ introduced a states' rights bill.⁵⁴ It reached its peak in 1957 when Senator Jenner of Indiana introduced a bill invoking Congress' powers under article III of the Constitution and calling for removal of the federal courts' authority to review certain classes of cases.⁵⁵

Hearings brought out both proponents and opponents of the bill,⁵⁶ and some, including Senator Thurmond of South Carolina, proposed additional restrictions while supporting the Jenner proposal. In addition to the classes of cases enumerated by the Jenner bill, Thurmond and others⁵⁷ sought to remove federal appellate jurisdiction over cases dealing with school litigation.

Opposition to the Jenner bill originated in several quarters. Senate liberals were in clear discord with the provisions as were the Justice Department⁵⁸ and many lawyers and law professors.⁵⁹ In the face of this resistance Senator Jenner joined forces with Senator Butler and modified the bill so as to avoid almost certain defeat. In its Jenner-Butler form it met with success in the Judiciary Committee and eventually passed the House in 1958.⁶⁰ But Senate liberals opposed the Jenner bill even in its modified form, considering it "part of a 'reverse the Court' campaign which [stemmed] largely . . . from the earlier decision in the *Brown* case."⁶¹

Due to maneuvers by the Senate Majority Leader, Lyndon Johnson, the bill

52 See note 64 *infra*. For a historical analysis of the congressional-judicial conflict of the 1950's see generally Elliott, *Court-Curbing Proposals in Congress*, *supra* note 7; C. RITCHETT, *supra* note 7; MURPHY, *supra* note 39.

53 MURPHY, *supra* note 39, at 91.

54 H.R. 3, 84th Cong., 1st Sess. (1955).

55 S. 2646, 85th Cong., 1st Sess. (1957). See also the House version of S. 2646: H.R. 9207, 85th Cong., 1st Sess. (1957).

The Jenner proposal would have stripped the Supreme Court of appellate jurisdiction:

. . . over all cases involving the validity of: 1) Contempt proceedings against witnesses before congressional committees; 2) dismissal of government employees on security grounds; 3) state laws for the control of subversive activities; 4) regulations relating to subversive activities of public school teachers; and 5) state requirements for the admission to the practice of law.

56 *Hearings on the Limitations of Appellate Jurisdiction of the United States Supreme Court Before a Subcomm. of the Senate Comm. on the Judiciary*, 85th Cong., 1st & 2d Sess. (1958).

57 Other bills concerned with judicial jurisdiction over public school disputes were suggested by two South Carolina congressmen. In 1957, Representative Rivers submitted legislation that would preclude federal court jurisdiction over any action involving the validity of state provisions relating to public schools. H.R. 1228, 85th Cong., 1st Sess. (1957). Similarly, Senator Johnston of South Carolina proposed a bill to deprive the Supreme Court of appellate jurisdiction "in any case wherein the action of a state concerning its public schools is attacked on grounds other than substantial inequality of physical facilities and other tangible factors." S. 3467, 85th Cong., 2d Sess. (1958).

58 The Justice Department suggested that the bill be shelved. Attorney General Rogers himself described the Jenner bill as a "retaliatory measure" which threatened the judiciary's independence. MURPHY, *supra* note 39, at 161.

59 Most of the law schools and lawyers contacted clearly opposed the bill. Dean O'Meara of Notre Dame Law School termed the bill "vicious." The University of Alabama Law School deemed the proposal "unwise." *Id.*

60 In 1958 segregationists were once again calling for strong congressional action to curb the Court. See, e.g., 104 CONG. REC. 2330 (1958) (remarks of Congressman Colmer). 1958 also saw the resurgence of the more stringent Smith bill, H.R. 3. MURPHY, *supra* note 39, at 172.

61 104 CONG. REC. 18693 (1958) (remarks of Senator Douglas).

never came to a vote in the Senate and the legislative session adjourned with the Warren Court surviving the onslaught.⁶² Things were nevertheless far from peaceful for the Court. Only four days after adjournment the tribunal was called into special session due to school desegregation problems in Little Rock, Arkansas. In unanimously denying the Little Rock School Board's request for a temporary return to segregation, the Court unflinchingly asserted its authority. Chief Justice Warren wrote for the Court:

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall . . . declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States . . .⁶³

Despite the Chief Justice's assertive statement, the Court was notably less aggressive beginning with the 1958 term and actually withdrew from some of the earlier positions which proved so unpopular with a large segment of Congress.⁶⁴ As a result, when Congress reconvened, the fire of the past session was gone and the conflict between the Warren Court and Congress had followed the well-worn path of judicial decision, legislative reaction, judicial retreat, and then, quiescence.⁶⁵ It is important to note, however, that the Court's withdrawal occurred after the threat of retaliatory legislation had practically passed⁶⁶ and further that there was not the slightest retreat from the desegregation decisions.

IV. The New Attack: A Congressional Roadblock to Court-ordered Busing

By standing firm on its desegregation policies, the Warren Court assured itself a precarious peace at best, and though the 1960's remained relatively tranquil⁶⁷ the battle was to be renewed over the most divisive domestic issue of the 1970's—court-ordered busing of school children for purposes of racial balance.

62 Murphy, in his treatise on Congress and the Court, concluded that anti-court legislation would surely have passed the 85th Congress had the proponents been satisfied with the less restrictive acts. However, by pushing the stricter court-curbing legislation they came into conflict with Senator Johnson. The powerful majority leader opposed the legislation because he feared it would contain a number of anti-desegregation amendments. MURPHY, *supra* note 39, at 172.

63 *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

64 The Court was heavily criticized for several decisions allegedly displaying permissiveness toward "communists": *Kent v. Dulles*, 357 U.S. 116 (1958); *Watkins v. United States*, 354 U.S. 178 (1957); and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). Two cases retreated from the more permissive view and thereby relieved much of the pressure on the Court. *Barenblatt v. United States*, 360 U.S. 109 (1959); *Uphaus v. Wyman*, 360 U.S. 72 (1959).

65 Elliott, *supra* note 7.

66 Halper, *supra* note 17.

67 The Court did come under some pressure in 1964 when legislation was proposed in reaction to the reapportionment cases of *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v.*

A. Proposed Legislation

After several attempts in Congress early in 1972 to prevent court-ordered busing,⁶⁸ President Nixon presented a special message to Congress officially renewing the attack on the federal courts' school desegregation decisions.⁶⁹ In his address he criticized busing orders in lower federal courts, stating they had led to inconsistency, contradiction, uncertainty, and unequal treatment and, further, that they had gone beyond what is reasonable and necessary.

Accompanying the communication was proposed legislation which by design would have a two-pronged effect: 1) it would bar all new judicially imposed transportation orders until July 1, 1973, or until Congress enacted appropriate remedial legislation;⁷⁰ and 2) it would permanently limit remedies available to federal courts charged with the elimination of dual school systems.⁷¹ The latter effect would be achieved by the Equal Educational Opportunities Act which, in addition to concentrating school-aid funds in areas of greatest need, would establish priorities among remedies to be used for desegregation of schools, with busing to be used only as a last resort and then under strict limitations. The short-run freeze on busing would be accomplished by means of the Student Transportation Moratorium Act. According to President Nixon this Act would not contravene fourteenth amendment rights, but simply hold further busing orders "in abeyance" until Congress has investigated and considered alternative means to secure those rights.⁷² He argued that enactment of his proposed legislation would: 1) put an immediate stop to new busing orders by federal courts; 2) enlist the services of Congress in solving the problems of desegregation; 3) establish uniform national criteria; 4) protect and maintain neighborhood

Sims, 377 U.S. 533 (1964). Representative Tuck proposed an act to deny the Supreme Court jurisdiction —

to review the action of a Federal court or a State court of last resort concerning any action taken upon a petition or complaint seeking to apportion or reapportion any legislature of any State of the Union or any branch thereof. . . .

The district courts shall not have jurisdiction to entertain any petition or complaint seeking to apportion or reapportion the legislature of any State of the Union or any branch thereof, nor shall any order or decree of any district or circuit court now pending and not finally disposed of by actual reapportionment be hereafter enforced. H.R. 11926, 88th Cong., 2d Sess. (1964).

Senator Dirksen introduced a similar bill which read: Upon application made by or on behalf of any State or by one or more citizens thereof in any action or proceeding in any court of the United States, or before any justice or judge of the United States, in which there is placed in question the validity of the composition of either house of the legislature of that State or the apportionment of the membership thereof, such action or proceeding shall be stayed until the end of the second regular session of the legislature of that State which begins after the date of enactment of this section. S. 3069, 88th Cong., 2d Sess. (1964).

Both the Tuck and Dirksen bills were ultimately eliminated by the Conference Committee. McKay, *Court, Congress, and Reapportionment*, 63 MICH. L. REV. 255 (1964).

68 See, e.g., H.R. 13176, 92d Cong., 2d Sess. (1972).

69 Special Message from President Nixon Submitted to Congress on Busing and Equality of Educational Opportunity, H.R. Doc. No. 195, 92d Cong., 2d Sess. (1972).

70 Student Transportation Moratorium Act, S. 3388, 92d Cong., 2d Sess. (1972).

71 Equal Educational Opportunities Act, S. 3395, 92d Cong., 2d Sess. (1972). See note 6 *supra* in regard to the duty of federal courts to eliminate dual school systems.

72 Note 69 *supra*, at 3.

schools; and 5) still not roll back the Constitution or "undermine the continuing drive for equal rights."⁷³

Congress responded to the presidential request with less stringent antibusing provisions than those asked for; nevertheless, President Nixon reluctantly signed the measures into law. The Education Amendments of 1972, unlike the Administration proposals, do not bar federal courts from issuing busing orders. Instead, they postpone the effectiveness of such orders pending the exhaustion of related appeals, or, where none are taken, expiration of the time allotted for such appeals. Section 803 states that district court orders requiring the transportation of students "for the purpose of achieving a racial balance . . . shall be postponed until all appeals have been exhausted, or . . . until the time for such appeals has expired."⁷⁴ In addition, section 802 (a) of the Act prohibits the use of federal funds for the transportation of students or teachers "except on the express written voluntary request of appropriate local school officials" and where the time, distance of travel, and diminishment of educational opportunities are not unreasonable.⁷⁵

B. *Reliance Upon the Fourteenth Amendment*

Both the presidential and congressional proposals rely in part upon the now-familiar article III powers for their support. For the first time in the history of congressional-judicial disputes, however, Congress' powers under the fourteenth amendment have been enlisted in support of anticourt legislation. During a news conference in which he explained the Administration proposal, Attorney General Kleindeinst concluded:

[T]here can be no legitimate doubt whatsoever that, as a result of the power conferred upon the Congress in Section 5 of the 14th Amendment and also Article III of the Constitution, [the proposed legislation is constitutional].⁷⁶

This new reliance upon the fourteenth amendment may have been prompted by the 1966 decision of *Katzenbach v. Morgan* which adopted a broad new interpretation of section five of the amendment.

Section five of the fourteenth amendment gives Congress the "power to enforce, by appropriate legislation" the equal protection and due process require-

⁷³ *Id.* at 2.

⁷⁴ See note 3 *supra*.

⁷⁵ Sec. 802 (a). No funds appropriated for the purpose of carrying out any applicable program may be used for the transportation of students or teachers . . . in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers . . . in order to carry out a plan of racial desegregation . . . except on the express written voluntary request of appropriate local school officials. No such funds shall be made available for transportation when the time or distance of travel is so great as to risk the health of the children or significantly impinge on the educational process of such children, or where the educational opportunities available at the school to which it is proposed that any such student be transported will be substantially inferior to those opportunities offered at the school to which such student would otherwise be assigned

⁷⁶ 118 CONG. REC. 2881 (daily ed. Mar. 29, 1972). See also note 69 *supra*, at 2; 118 CONG. REC. 4416 (daily ed. April 28, 1972) (statement by Harvard Law Faculty members questioning validity of section 5 powers).

ments of that amendment. In early cases interpreting the section, the Court reserved for itself the power to declare what acts were forbidden by the fourteenth amendment. Congress' authority under section five was limited to corrective legislation.⁷⁷ If the Court had not first declared an activity to be in violation of the amendment, Congress, according to this early interpretation, was powerless to act. This approach was abandoned in 1966 when *Katzenbach v. Morgan*⁷⁸ was decided. *Morgan* dealt with the constitutionality of section 4(e) of the Voting Rights Act of 1965 which requires that persons who have successfully completed the sixth grade in a Puerto Rican school using a language other than English for its instruction shall not be denied the right to vote simply because they cannot read or write English. Such a requirement was defended by the attorney general of New York State on the grounds that section 4(e) was unconstitutional since congressional power under the fourteenth amendment can only be employed *after* the judicial branch has determined that there has been a violation of the amendment.⁷⁹

The Court rejected this argument, stating that neither the language nor history of section five supported that construction⁸⁰ and adopted a broad new interpretation of the section:

Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.⁸¹

Under this interpretation, the Court saw no need to find the New York act in violation of the fourteenth amendment, but was satisfied that it was "able to perceive a basis" upon which Congress could have determined that a denial of rights existed.⁸² Therefore, the fact that the tribunal itself had found a North Carolina literacy provision constitutional in *Lassiter v. Northampton Election Bd.*⁸³ was considered inapposite.⁸⁴ The Court concluded that legislation should be upheld as long as it meets the two conditions devised by Justice Marshall to determine the reach of the "necessary and proper" powers of Congress:⁸⁵ 1) the enactment must be adapted to and appropriate for the enforcement of the fourteenth amendment; and 2) it must be consistent with the "letter and spirit of the Constitution."⁸⁶

Justice Harlan dissented, arguing that if Congress is permitted, by virtue of its powers under section five, to overrule *Lassiter* and to expand the substantive scope of the fourteenth amendment, there would be nothing to prevent

77 See, e.g., *Civil Rights Cases*, 109 U.S. 3, 11 (1883). See also Note, *Fourteenth Amendment Enforcement and Congressional Power to Abolish the States*, 55 CAL. L. REV. 293 (1967).

78 384 U.S. 641 (1966).

79 384 U.S. at 648.

80 *Id.*

81 *Id.* at 651.

82 *Id.* at 653.

83 360 U.S. 45 (1959).

84 384 U.S. at 649.

85 U.S. CONST. art. I, § 8 allows Congress to "make all Laws necessary and proper for carrying into Execution" its article I powers.

86 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 159 (1819).

the legislative branch from diluting fourteenth amendment rights already established by judicial decisions.

The majority tried to dispel Harlan's fears in a footnote where it warned:

Contrary to the suggestion of the dissent, . . . § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.⁸⁷

Nevertheless, Justice Harlan correctly perceived that the tribunal had placed itself in a compromising position.⁸⁸ Despite its progressive leanings, the Warren Court had created a dilemma which is now being manifested in congressional reliance upon its section five powers to attack the Court. Professor Cox, while applauding the *Morgan* decision, best summarized the situation when he said:

It is hard to see how the Court can consistently give weight to the congressional judgment in expanding the definition of equal protection in the area of human rights but refuse to give it weight in narrowing the definition where the definition depends upon appraisal of the facts. The [majority's] footnote, therefore, may not end the argument.⁸⁹

The Supreme Court itself has thus provided Congress with a new foothold in the latest assault upon the courts.

V. The Constitutionality of a Moratorium on Court-ordered Busing

The response to the President's proposals and the Education Amendments of 1972 has been varied. Some have criticized the congressional legislation as not only lacking in force⁹⁰ but prejudicial to the southern states already operating under court-ordered busing plans.⁹¹ As a result, it is virtually guaranteed that

⁸⁷ 384 U.S. at 651-52 n.10.

⁸⁸ A few analysts immediately recognized the prescience of Harlan's dissent. See Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 95 (1966); Comment, *Constitutional Law: Voting Rights—English Literacy Requirement*, 20 OKLA. L. REV. 189, 190 (1967); Comment, *Constitutional Law—1965 Voting Rights Act—§ 4(e) Appropriate to Enforce Equal Protection*, 13 WAYNE L. REV. 435, 437 (1967).

The majority, however, did not. See, e.g., Note, *Fourteenth Amendment Enforcement and Congressional Power to Abolish the States*, 55 CAL. L. REV. 293, 316 (1967); Survey, *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 124, 171-2 (1966); Comment, *Constitutional Law—Congressional Power Under the Fifth Section of the Fourteenth Amendment*, 41 TUL. L. REV. 120, 125 (1966).

⁸⁹ Cox, *The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106 n.86 (1966).

⁹⁰ See remarks of congressmen quoted at note 5 *supra*.

⁹¹ See, e.g., 118 CONG. REC. 4794 (daily ed. Mar. 24, 1972) (remarks of Senator Gurney); see also note 5 *supra*.

stricter proposals along the Administration lines will be reconsidered.⁹² Opponents of the bills, on the other hand, have questioned the constitutionality of any enactment which restricts the right of the federal courts to provide the remedy of busing.⁹³ The remainder of this article will deal specifically with this constitutional question.

Under both the presidential proposal and the congressional enactment, busing of school children is, at the very minimum, postponed while the legislature contemplates ways to deal with the busing issue. Such a postponement in effect suspends the right to an equal education and ignores Supreme Court decisions.

The Supreme Court has clearly established what the Constitution requires in the area of school desegregation. Prior to 1954 the Court accepted the view taken in *Plessy v. Ferguson*⁹⁴ that "equal but separate" facilities for blacks and whites were constitutionally valid under the fourteenth amendment. But *Brown v. Board of Education* reversed *Plessy*, antithetically considering separate educational facilities "inherently unequal" and violative of the equal protection clause of the fourteenth amendment.⁹⁵ A year after *Brown* the Court implemented its decision⁹⁶ by charging the inferior federal courts to consider "whether the action of school authorities constitutes good faith implementation of the governing constitutional principles,"⁹⁷ and by calling for desegregation of dual school systems "with all deliberate speed."⁹⁸ After a period of quiescence,⁹⁹ the Court renewed its attack on racial segregation of schools, stating that "no official . . . plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment."¹⁰⁰ By 1964, ten years after the original *Brown* decision, "[t]he time for mere 'deliberate speed' [had apparently] run out, and [the] phrase [could] no longer justify denying . . . children their constitutional rights to an [equal] education. . . ."¹⁰¹ The Court clearly restated this view in 1969:

[T]he Court of Appeals should have denied all motions for additional time because continued operation of segregated schools under a standard of

92 The House Education Subcommittee has already approved the Nixon antibusing bill in revitalized form despite the congressional enactment of antibusing measures.

93 118 CONG. REC. 2386 (daily ed. Mar. 22, 1972) (remarks of Representative Abzug); 118 CONG. REC. 8284-85 (daily ed. May 23, 1972) (remarks of Senator Wiecker); 118 CONG. REC. 8386 (daily ed. May 24, 1972) (remarks of Senator Mondale); *id.* at 8398 (remarks of Senator Kennedy); Seymour & Sargentich, *The Constitutionality of the Nixon Administration's Proposed Student Transportation Moratorium Bill*, *id.* at 8387-90; *id.* at 8375 (remarks of Senator Javits); 118 CONG. REC. 8917 (daily ed. June 7, 1972) (remarks of Senator Bayh).

94 163 U.S. 537 (1896).

95 347 U.S. at 495. The Court concluded that:

To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. *Id.* at 494.

96 *Brown v. Board of Education*, 349 U.S. 294 (1955).

97 *Id.* at 299.

98 *Id.* at 301.

99 Following the congressional assault on the Court in the mid-1950's, the tribunal retreated in several of the more volatile areas thus quieting congressional criticism and pressure. See note 64 *supra*. While the Court did not retreat from its decisions in the area of school desegregation, they did almost completely avoid any decisions in the area until the early 1960's.

100 *Goss v. Board of Education*, 373 U.S. 683, 689 (1963).

101 *Griffin v. School Board*, 377 U.S. 218, 234 (1964); *accord*, *Bradley v. School Board*, 382 U.S. 103, 105 (1965); *Green v. County School Board*, 391 U.S. 430 (1968).

allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.¹⁰²

One month later it reversed the Fifth Circuit Court of Appeal's authorization of a one-semester delay in full integration¹⁰³ which, like the current antibusing legislation, would supposedly have provided time for in-depth studies of possible solutions.

Two cases are particularly pertinent to this discussion since they deal specifically with student transportation orders. The leading "busing" case, *Swann v. Board of Education*,¹⁰⁴ was the Court's attempt "to formulate guidelines" for implementation of the constitutional commands.¹⁰⁵ Restating the obligation to provide remedies "forthwith,"¹⁰⁶ the Court pointed to the broad equity powers of the inferior federal courts charged with the task of total elimination of state-imposed segregation¹⁰⁷ and concluded that:

[There is] no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.¹⁰⁸

More specifically, the Court stated in *Board of Education v. Swann*:¹⁰⁹

[A]n absolute prohibition against transportation of students assigned on the basis of race . . . will . . . hamper the ability of local authorities to effectively remedy constitutional violations. As noted in *Swann*, bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it.¹¹⁰

In insisting upon transportation of students in certain situations, the tribunal was not unmindful of legitimate concern over "excessive" busing. In order to avoid the use of transportation remedies where they were not warranted or desirable, certain criteria were set down. According to the *Swann* interpretation of the constitutional mandate, neither exact mathematical ratios nor inflexible requirements were essential to proper school desegregation. Such devices merely provide a good starting point in shaping remedies for past constitutional violations.¹¹¹ Where the "time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process," an alternative to busing for desegregation purposes is imperative.¹¹²

102 *Alexander v. Board of Education*, 396 U.S. 19, 20 (1969).

103 *Carter v. West Feliciana School Bd.*, 396 U.S. 290 (1970).

104 402 U.S. 1 (1971).

105 *Id.* at 6.

106 *Id.* at 14.

107 *Id.* at 15.

108 *Id.* at 30.

109 402 U.S. 43 (1971).

110 *Id.* at 46.

111 402 U.S. at 24-5.

112 *Id.* at 30-31.

Clearly, then, the Education Amendments of 1972 and the legislation proposed by the Administration are in conflict with the decisions of the Supreme Court as to minimum constitutional criteria for desegregation of schools. The level of constitutional protection prescribed by these antibusing proposals settles well below what the Court considers essential. Since the Court is the final arbiter of the Constitution,¹¹³ this antibusing legislation must fall.

The constitutional criteria for desegregation of schools, as set down in the Supreme Court decisions, may be summarized as follows:

1. Separate educational facilities are inherently unequal and violative of the fourteenth amendment's equal protection clause.
2. Dual school systems must be eliminated immediately — no delay will be tolerated.
3. Federal courts are empowered with strong equity capabilities and as such can and should rely upon forced busing of school children for desegregation purposes where no other remedy will properly enforce the constitutional guarantees,
4. *Except*—where the time or distance of travel is such that the children's health will be endangered or the educational opportunities stifled, an alternative remedy must be employed.

Tested against these criteria, the Nixon proposals are deficient in at least two respects. First, by declaring a national commitment to neighborhood schools and requesting the use of federal funds to improve inner-city educational facilities, the President is leading the way back to the "separate but equal" doctrine denounced in *Brown*.¹¹⁴ Such a result is inevitable as long as segregated neighborhoods predominate throughout the country.¹¹⁵ Children from segregated neighborhoods, if they are to attend neighborhood schools, will necessarily attend segregated institutions and the use of federal funds for these facilities will at best attain physical equality among the various schools. The Equal Educational Opportunity Act thus ignores a fundamental constitutional maxim—namely, separate can never be equal.

¹¹³ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 87 (1803).

¹¹⁴ Several congressional commentators have viewed the presidential legislation as a return to "separate but equal." See, e.g., 118 CONG. REC. 4204-06 (daily ed. Mar. 20, 1972) (remarks of Senator Kennedy); 118 CONG. REC. 2386 (daily ed. Mar. 22, 1972) (remarks of Representative Abzug).

¹¹⁵ The Commission on Civil Rights has taken notice of this fact. In a recent response to the Nixon proposals it concluded:

What Americans must keep in mind, in the furor over the busing debate, is that to restrict busing in most communities is simply to restrict desegregation. This is so because of the segregated neighborhoods that exist from coast to coast . . . [E]ven with a concerted effort to eliminate well-entrenched patterns of housing segregation, it would take generations to undo or even significantly alter them and thus to alter the educational opportunity of the children who live in segregated neighborhoods near inferior, segregated neighborhood schools. STATEMENT OF THE UNITED STATES

COMMISSION ON CIVIL RIGHTS CONCERNING THE PRESIDENT'S MESSAGE TO CONGRESS AND PROPOSED LEGISLATION ON BUSING AND EQUAL EDUCATIONAL OPPORTUNITIES, at 8 (1972).

In a second sense, both the Nixon proposals and the congressional enactments fail to meet the constitutional prerequisites announced by the Supreme Court. Both are designed to postpone the use of busing as a remedy for racial segregation. Where busing is the only remedy available, this amounts to a postponement of judicial enforcement of rights defined in the *Brown* decision. In light of the Court's requirement of *immediate* desegregation and its express recognition of student transportation as a means for achieving that objective, the delays envisioned in any moratorium on busing are constitutionally unacceptable.

But the constitutionality of the proposed antibusing measures may be questioned on much broader grounds as well. It is the duty of the courts to determine constitutional requirements with regard to school desegregation. A necessary correlative to that duty is the ability to prescribe and enforce any remedy which the Court considers necessary. The proposed legislation would eliminate what may be the only effective remedy in some cases. Such a gross infringement upon the courts cannot be justified by the limited authorization of article III and section five of the fourteenth amendment. Unquestionably, Congress can exercise its article III powers to limit the remedies available to the Court, but Congress cannot deny the use of *all* remedies by which a constitutional right might be protected¹¹⁶ since that would amount to an indirect suspension of the constitutional right involved. Thus, where busing is the only means of redressing a constitutional violation, it is not within the legislature's power to deprive the federal courts of that remedial tool.¹¹⁷

Perhaps the most serious infirmity of the proposed legislation is that it violates the basic constitutional premise of separation of powers. Separation of powers was the governmental concept most unanimously accepted by the nation's founding fathers.¹¹⁸ They considered the independence of the judiciary from both the legislative and executive branches of government as the keystone of a national philosophy which seeks to uphold both collective security and individual freedom.¹¹⁹

The Supreme Court has fortified its independent status and asserted its position as ultimate protector and interpreter of the rights guaranteed by the Constitution. Under the tribunal's interpretation, it not only can, but is required

116 See Hart, *supra* note 17, at 1366; 118 CONG. REC. 4076-78 (daily ed. April 21, 1972) (article by Baugher reprinted from Ripon Society's FORUM).

117 118 CONG. REC. 2880 (daily ed. Mar. 29, 1972) (remarks of Representative Thompson).

118 For example, Madison, after stating that —
[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny
concluded that liberty requires that the three great departments of power should be separate and distinct. THE FEDERALIST No. 47, at 301 (Mentor ed. 1961) (J. Madison). Hamilton was in accord, noting: "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." *Id.* No. 78, at 466 (A. Hamilton).

119 A. VANDERBILT, THE DOCTRINE OF SEPARATION OF POWERS AND ITS PRESENT DAY SIGNIFICANCE 98 (1953). The experience of the colonists with regard to their English constitutional rule made the separation of governmental organs particularly attractive to them. After living within the grasp of a completely centralized British motherland they were intent on producing a government free from such executive control of the judiciary. *Id.* at 50. See also Ervin, *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROB. 108 (1970). All of the initial state constitutions called for three departments of government and six specifically established executive, legislative, and judicial branches. Fairlie, *The Separation of Powers*, 21 MICH. L. REV. 393, 397 (1923).

to disturb the results of the political process where they are found to be in conflict with the Constitution. This procedure is commonly termed "judicial supremacy" and under it, the federal judiciary becomes the guardian of the fundamental canons.¹²⁰ In other words, "[t]he Constitution and rules deduced from it are held to be paramount law before which all statutes and public acts . . . not in accord with its provisions must give way."¹²¹

Justice Marshall first announced the philosophy of "judicial supremacy" in his classic *Marbury v. Madison* opinion.¹²² Proclaiming that "[i]t is emphatically the province and duty of the judicial department to say what the law is," Marshall stated "the constitution controls any legislative act repugnant to it"; and denoting the Constitution as "fundamental and paramount" law, he concluded that Congress cannot alter it by ordinary legislation.¹²³ Later cases restated the Marshall view and deemed the question of whether congressional enactments were within the limits of the legislature's delegated power a judicial one.¹²⁴

Estimating the extent of "judicial supremacy," congressional attempts to completely prevent the courts from passing upon constitutional questions or providing remedies for constitutional infringements will surely evince judicially denoted violations of the constitutional requirement that all judicial power be vested in the federal courts.¹²⁵ In addition, due process and equal protection are now considered "inherent in the American concept of free government."¹²⁶ They place implied limits on the legislative power and lend themselves to judicial restrictions upon it. As a result, article III powers and the authority granted by section five of the fourteenth amendment can only be exercised with due regard to these prohibitions. While article III empowers Congress to limit the jurisdiction of the federal courts and section five allows it to enact legislation to enforce the fourteenth amendment, "that power is circumscribed by the . . . fifth amendment"¹²⁷ so that the national legislature cannot exercise those powers in such a way as to deprive a person of equal protection of the laws.

If the third article bestows plenary power on Congress to control the appellate jurisdiction of both inferior federal courts and the Supreme Court, the legislature may constitutionally do either of the following: 1) abolish lower federal

120 See generally W. MENDELSON, *THE CONSTITUTION AND THE SUPREME COURT* (1959).

121 C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 24 (1959).

122 *Marbury*, while the first judicial decision proclaiming the courts' supremacy, was based on rather strong precedent. The records of the Constitutional Convention suggest that a majority of delegates understood the ramifications of a supreme constitutional authority and planned for the courts to have this power. W. MENDELSON, *supra* note 120, at 2. Typical of this point of view was Alexander Hamilton who, in urging ratification of the Constitution, announced:

[C]ourts of justice . . . [have the duty] to declare all acts contrary to the manifest tenor of the Constitution void . . . [E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. *THE FEDERALIST* No. 78, at

466-67 (Mentor ed. 1961) (A. Hamilton).

123 5 U.S. (1 Cranch) at 111.

124 See, e.g., *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 347 (1856); *Gordon v. United States*, 117 U.S. 697, 699-701, 705 (1884).

125 Note, *Congress vs. Supreme Court—A Constitutional Amendment?*, 22 VA. L. REV. 665, 671 (1936).

126 C. HAINES, *supra* note 121, at 22-23.

127 118 CONG. REC. 2386 (daily ed. Mar. 22, 1972) (remarks of Representative Abzug).

courts, thereby confining the national judiciary to a single Supreme Court capable *only* of exercising original jurisdiction over cases affecting "ambassadors, other public ministers and consuls, and those in which a state shall be a party"; 2) deprive the Supreme Court of appellate jurisdiction over all cases arising under the United States Constitution, laws, and treaties. Stated differently, if congressional control over federal jurisdiction is complete, Congress could entirely alter the American governmental structure and all but destroy the judiciary as a coordinate branch.¹²⁸

In regard to the busing dispute, the first alternative would be as efficacious as the second and no need would exist to deprive the Supreme Court of its appellate jurisdiction. By denying to inferior federal courts the original power to hear desegregation disputes, Congress would effectually deny jurisdiction to the Supreme Court since no source would exist from which appeals could be brought.¹²⁹

The "exceptions and regulations" clause does not, however, extend Congress such far-reaching power and studies of the Constitutional Convention and ratification debates negate the validity of reliance upon it.¹³⁰ Article VI of the Constitution makes that document the "supreme law of the land"¹³¹ and article III, section 1 coordinately establishes federal tribunals with "nationwide authority to interpret and apply the supreme law." Thus, the federal courts and the Supreme Court, in particular, are the instruments used to implement article VI and as such they have the essential constitutional function of providing a tribunal by which the supreme law will be maintained.¹³² Viewed in this light, the "exceptions and regulations" provisions of article III do not narrow the scope of the judicial duty to interpret the supreme law, or destroy the courts' essential role in the constitutional scheme.¹³³ A more reasonable interpretation of the clause would allow Congress to control the jurisdiction of the federal judiciary in a manner consistent with the court's constitutional province.¹³⁴ The legislature goes beyond its authorization when it interferes with the exercise of purely judicial functions and cannot rely upon article III to disguise attempts to regulate civil rights.¹³⁵ The power to govern jurisdiction is subject to the strictures of the entire Constitution and Congress cannot bar access to judicial protection where by doing so it contradicts the very document empowering it to establish "exceptions and regulations" in the first place.¹³⁶

128 Ratner, *supra* note 17, at 158.

129 Halper, *supra* note 17, at 308.

130 At the Constitutional Convention an amendment which would have given Congress plenary power over the jurisdiction of the Supreme Court was defeated. Thus, the proceedings confirmed the essential function of the Supreme Court and allowed it "to function at all times under its constitutional mandate." Ratner, *supra* note 17, at 172.

The ratification debates in the various states centered almost exclusively around retrial by the Court of facts already determined by a jury. Nowhere was it mentioned that article III, section 2 was designed to allow congressional withdrawal of the Court's jurisdiction if such a withdrawal goes beyond constitutional limits such as the fourteenth amendment. R. BERGER, *CONGRESS V. THE SUPREME COURT* 289 (1969).

131 U.S. CONST. art. VI, states, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land. . . ."

132 Ratner, *supra* note 17, at 160.

133 118 CONG. REC. 4076-78 (daily ed. April 21, 1972) (article by Baugher reprinted from Ripon Society's FORUM).

134 Ratner, *supra* note 17, at 172.

135 Lenoir, *supra* note 17, at 36.

136 Hart, *supra* note 17, at 1371.

It is an established postulate of constitutional government that a tribunal must always be available to judge constitutional claims.¹³⁷ Ancillary to that is the requirement that such a tribunal be allowed to fashion the necessary remedies by which to enforce the fundamental protections.¹³⁸ The conclusion as to the busing dispute is therefore axiomatic. Congress can neither deny jurisdiction to the Supreme Court nor prevent the use of student transportation as a remedy unless other suitable solutions exist. The legislature is also powerless to deny the remedy to lower federal courts since this would in effect deprive the Supreme Court of a proper hearing of desegregation issues and constructively eliminate tribunals capable of fashioning the necessary remedies.

The Supreme Court article III announcements discussed earlier in this note, while providing some apparent support for the proposition that Congress can retract the federal courts' power to order busing, actually provide no basis whatsoever. Even the concession made by the post-Civil War Court in the *McCardle* case is of questionable value to the legislature. While that tribunal allowed Congress to completely strip it of appellate jurisdiction over habeas corpus petitions, the language did not sanction "congressional impairment of the [Supreme Court's] essential constitutional functions,"¹³⁹ and anyone viewing the case as "acknowledging the existence of congressional power to thwart the Supreme Court's appellate jurisdiction through *ad hoc* legislation" severely misinterprets the holding.¹⁴⁰ The historical setting of the case is worth noting,¹⁴¹ but more importantly, other remedies remained available. Circuit Courts of Appeals were still open to habeas corpus petitions as was the Supreme Court itself where the petition for the writ was filed with it in the first instance.¹⁴² "The legislation did no more than eliminate one procedure for Supreme Court review of decisions denying habeas corpus while leaving another equally efficacious one available,"¹⁴³ and it is doubtful "whether the *McCardle* case could command a majority view today."¹⁴⁴

Not three years after *McCardle* the Court demonstrated that it had no intention of conceding its power to Congress. While *United States v. Klein*¹⁴⁵ was pending in the Supreme Court Congress withdrew jurisdiction over such actions as it had in *McCardle*. However, this time the Court reprimanded the legislature stating:

[T]his is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

....

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct.¹⁴⁶

137 *Id.* at 1372.

138 *Id.* at 1366.

139 Ratner, *supra* note 17, at 180.

140 *Id.*

141 See note 43 *supra* and accompanying text.

142 74 U.S. (7 Wall.) at 515. See also note 136 *supra* at 1365.

143 Ratner, *supra* note 17, at 180.

144 *Glidden Company v. Zdanok*, 370 U.S. 530, 605 n.11 (1962) (dissenting opinion).

145 80 U.S. (13 Wall.) 128 (1872).

146 *Id.* at 146-47.

The practical ramifications of *McCardle* and the principle asserted in *Klein* preclude any congressional attempts to control the Court's decision in any particular case by means of jurisdictional limitation, and the Court must therefore remain available to ultimately resolve constitutional conflicts including those involving segregated schools.

Any reliance upon section five of the fourteenth amendment can be likewise dismissed despite the decision in *Katzenbach v. Morgan*. While the *Morgan* tribunal placed itself in a vulnerable position by allowing Congress to determine constitutional requirements prior to a judicial decision, it did not relinquish its final authority to interpret the meaning of the Constitution as basic law, since ultimately the Court "alone can place the imprimatur of constitutionality on the public policies which are tested before its bench." The Court did agree that Congress had power to act, and in *Morgan* allowed it to do so in apparent opposition to the Supreme Court's own *Lassiter* decision. This fact plus the realization that the section five powers of the fourteenth amendment are unclear make that section the soundest upon which to premise any antibusing legislation.¹⁴⁷ Nevertheless, the *Morgan* decision, separation of powers doctrine, and Constitution itself preclude such extensive usurpation of power.¹⁴⁸ In allowing Congress to effectually overrule one of its pronouncements, the Court did not thereby allow the legislature to diminish civil rights. Rather, it permitted protection of those rights in greater degree than it had previously required and, specifically noting that enactments allowing states to establish racially segregated schools would deny equal protection, made it clear that while greater warrants of protection might be devised by Congress, in no case could that governmental organ "restrict, abrogate, or dilute" the guarantees embodied in the fourteenth amendment.¹⁴⁹ Within the constitutional framework, the Court itself must determine what is necessary to equal protection under the amendment and if its decision is stricter than that of Congress, the congressional decision must fall since it necessarily "restrict[s], abrogate[s], and dilute[s]."¹⁵⁰ As regards busing of children for desegregation purposes, the Supreme Court has concluded that under certain circumstances that remedy must be available if equal protection is to be provided. The less stringent congressional legislation eliminating or postponing this remedy must, therefore, fall.

Although Congress must be allowed wide discretion in the discharge of its duties, according to *Marbury v. Madison* and the traditional relationship between the courts and Congress, the legislature has no power to define its own limits.¹⁵¹

147 Immediately following the decision, several analysts concluded that the Court's reasoning would allow Congress to invoke federal powers in areas traditionally believed beyond congressional power. See, e.g., Comment, *Constitutional Law—Congressional Power Under the Fifth Section of the Fourteenth Amendment*, 41 *TUL. L. REV.* 120 (1966). At least two concluded that the case allowed Congress to regulate public education. Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, *supra* note 89, at 107-08; Note, *Fourteenth Amendment Enforcement and Congressional Power to Abolish the States*, 55 *CAL. L. REV.* 293, 311 (1967).

148 Note, *Fourteenth Amendment Enforcement and Congressional Power to Abolish the States*, 55 *CAL. L. REV.* 293, 311 (1967).

149 384 U.S. at 651 n.10.

150 See note 148 *supra*.

151 Bickel, *The Voting Rights Cases*, 1966 *SUP. CT. REV.* 79, 98 (1966).

That power belongs to the judiciary as the final arbiter of the Constitution and there is no reason to believe that the courts could or did abandon this function in either the *Morgan* or *McCardle* case.

VI. Conclusion

Senator Ervin, in a recent article, envisioned the nation as one burdening under "an aura of crisis."¹⁵² Seeking to rectify situations which we unwittingly consider disastrous, Americans have threatened the principle of an independent judiciary by invoking a "crisis" approach to solving problems.¹⁵³ The current busing furor attests to this view. The prospect of an integrated society has frightened many into calling upon their national legislators to take measures which would not only sharply restrict a coordinate branch of government and undermine the integrity of the federal judiciary, but would "cost [the nation] another whole generation of badly educated minority children, denied their constitutional rights to equal educational opportunity."¹⁵⁴

The antibusing legislation will almost certainly reach the Supreme Court where its constitutionality will be finally determined. The Court should declare the Education Amendments and any measures enacted pursuant to the Administration's recommendations unconstitutional. These enactments not only contravene the tribunal's requirement of immediate desegregation of dual school systems, but they are an abuse of the article III and fourteenth amendment powers of Congress and a violation of the principle of separation of powers. They are also antagonistic to the overall scheme of the Constitution which requires that federal courts always be available to hear and provide remedies for constitutional disputes. In regard to busing, therefore, it would be improper to deny either jurisdiction or an essential remedy to the federal tribunals.

Whether the Court will declare the measures void is another matter. Congress has presented the Court with an awesome choice between accepting "a severe limitation on its authority to endorse the 14th amendment or of declaring a law unconstitutional in the face of a highly emotional electorate."¹⁵⁵ If the Court so lacks public support as to be unable to avoid congressional action, it may be difficult to reclaim the public's favor merely by exerting its will.¹⁵⁶ President Roosevelt through his "court-packing" legislation and Senator Jenner by means of his 1957 bill focused political attention on the federal courts and thus impelled a change in judicial attitude.¹⁵⁷ By moderating its stand the Supreme Court was able to emerge from both attacks with its constitutional status unimpaired.¹⁵⁸

152 Ervin, *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROB. 108, 121 (1970).

153 *Id.* at 122.

154 STATEMENT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS CONCERNING THE PRESIDENT'S MESSAGE TO CONGRESS AND PROPOSED LEGISLATION ON BUSING AND EQUAL EDUCATIONAL OPPORTUNITIES, at 8 (1972).

155 118 CONG. REC. 4304-06 (daily ed. Mar. 20, 1972) (remarks of Senator Kennedy).

156 See Halper, *supra* note 17, at 324.

157 R. HIRSCHFELD, *supra* note 7, at 24.

158 The Court has already begun to retreat somewhat. In a recent 5-4 decision it barred splintering of school districts into smaller ones where the result is to perpetuate racial segregation. While the result is not inconsistent with past decisions, it is the first decision in the area

In the present dispute it is likely that the Court's course of action will follow the historical example. While the Administration's proposal extends far beyond what the Court should allow, the congressional proposals deny rights to a lesser degree. The Court, as a result, will in all probability uphold the Education Amendments of 1972 and attempt to provide unequivocal guidelines as soon as possible.

"[T]he strongest safeguard against the exercise of tyrannical power by men who want to live about the law, rather than under it" is an independent judiciary.¹⁵⁹ When the founding fathers embodied the separation of powers concept within the Constitution they assumed the existence "of a judicial system free from outside influence of whatever kind and from whatever source."¹⁶⁰ They recognized that the public officers were accountable to the law as were the constituents and that "liberty demands control by constant and uniformly enforced laws rather than by the arbitrary and inconstant whims of wilfull men."¹⁶¹ Surely none of the framers thought that the form of government they were implementing would create a federal judiciary "composed of judicial angels who could do no wrong."¹⁶² They knew that some judges would handicap the system's operation; nevertheless, all conceded that individual liberty would best be protected by an independent group of tribunals accountable to the Constitution alone. Their wisdom must not be rejected or our own freedom destroyed by rearranging the Constitution "to suit the whims of individual men."¹⁶³

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not supported by a unanimous vote. *Wright v. Council of the City of Emporia*, 40 U.S.L.W. 4806 (June 22, 1972).

159 Ervin, *supra* note 152, at 121.

160 *Id.*

161 *Id.*

162 *Id.* at 127.

163 *Id.*